

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of

OAH No. L 2006110317

JORGE R.

Claimant,

v.

SOUTH CENTRAL LOS ANGELES
REGIONAL CENTER,

Service Agency.

DECISION

Daniel Juárez, Administrative Law Judge with the Office of Administrative Hearings, heard this matter on January 31, 2007, in Los Angeles, California.

Shelan Y. Joseph, Esq., Office of the Los Angeles County Public Defender, represented Jorge R. (Claimant).¹

Judith Enright, Esq., Enright & Ocheltree, LLP, represented the South Central Los Angeles Regional Center (Service Agency).

The parties stipulated to the admission of exhibits A through BB. Consequently, those exhibits were admitted into evidence. The record remained open until February 13, 2007 for the parties to submit closing briefs. Claimant's brief was received timely and marked for identification as exhibit CC. Service Agency's brief was also received timely and marked for identification as exhibit DD. The parties submitted the matter for decision on February 13, 2007.

FACTUAL FINDINGS

1. Claimant applied to the Service Agency for regional center services, pursuant to the Lanterman Act (Welf. & Inst. Code, § 4500 et seq.) claiming to have a developmental disability, specifically mental retardation and/or a condition closely related to mental

¹ Claimant's surname is identified by initial throughout this Decision to protect his confidentiality.

retardation, and/or a condition wherein he requires treatment similar to that required by persons with mental retardation. The Service Agency denied eligibility on October 16, 2006. Claimant, through his attorney, requested a hearing on November 8, 2006. After an informal hearing on December 6, 2006, the Service Agency denied Claimant eligibility on December 8, 2006. This action then ensued.

2. Claimant appeals the Service Agency's denial of eligibility.

3. The Service Agency contends Claimant has a psychiatric disability and a learning disability, but he does not have mental retardation, or any other developmental disability as defined by state law, and Claimant is therefore not eligible for services.

4. The questions in Claimant's appeal are: 1) is Claimant a person with mental retardation? 2) If Claimant has mental retardation, does the mental retardation substantially disable him? 3) If Claimant has substantially disabling mental retardation, does he otherwise meet the statutory definition of a developmental disability, and is he thereby entitled to services from the Service Agency? 4) Alternatively, is Claimant a person with a condition closely related to mental retardation, or does he have a condition wherein he requires treatment similar to that required by persons with mental retardation? To succeed under the alternative argument, Claimant must still prove he is substantially disabled by his condition and that he otherwise meets the statutory definition of a developmental disability.

5. Claimant had applied for services earlier. The Service Agency denied that request on October 8, 2004. In 2005, the Service Agency reviewed additional documents provided by the California Youth Authority (CYA), (Claimant was committed to the CYA on August 14, 2001) to reconsider eligibility, but, on May 18, 2005, the Service Agency still concluded Claimant was ineligible and informed the CYA of its determination by letter.

6. A school psychologist from the Los Angeles County Office of Education, Division of Juvenile Court and Community Schools, performed a psychoeducational evaluation of Claimant on September 18, 2000. Claimant was 14 years old and attending the ninth grade within the juvenile hall school system at that time. The assessment notes Claimant performed in the "mentally deficient to borderline range of cognitive ability." (Exhibit F.) Claimant's intelligence was assessed using the Universal Nonverbal Intelligence Test and produced an intelligence quotient (IQ) of 69. Pursuant to the Scales of Independent Behavior, Brief Form, the school psychologist likened Claimant's adaptive functioning to that "of most nine year old students." (*Ibid.*) Claimant had difficulty identifying words like "danger" and "stop," telling time on a clock with hands, and writing his correct address. (*Ibid.*) He was unable to use the phone book. (*Ibid.*) Claimant's short-term memory was found weak. (*Ibid.*) Claimant performed math at a second grade level and read at a kindergarten level. The school psychologist diagnosed Claimant with specific learning disability, but wrote Claimant "could also be identified as mentally retarded." (*Ibid.*) The school psychologist considered mental retardation, but decided it was not the most accurate diagnosis. He wrote, "[h]is adaptive ratings concur with the deficit intellectual ratings. However, because of the few areas that are showing at least some greater potential, and

because of the levels of frustration experienced with academic work, it would appear that the [l]earning [d]isability is the more correct handicapping condition.” (*Ibid.*) The school psychologist recommended special education services (Claimant had not been previously identified as eligible. The school psychologist did not testify at hearing.

7. On or about March 22, 2004, another school psychologist with the CYA performed a psychoeducational evaluation of Claimant. Claimant was 18 years old at the time. Claimant was administered the Comprehensive Test of Nonverbal Intelligence (CTONI). According to the CTONI’s results, Claimant’s nonverbal IQ was within the mild mentally retarded range. His adaptive (daily living) skills were measured using the Adaptive Behavior Assessment System, Second Edition. Claimant’s adaptive skills were found to be in the moderately retarded range. The school psychologist described Claimant’s thinking as “concrete.” (Exhibit G.) Claimant’s communication was described as follows, “[Claimant’s] conversations [were] shallow, lack[ed] depth and [were] best understood by [Claimant] if . . . kept simple.” (*Ibid.*) Claimant’s reasoning and language were compared to that of six to eight-year-olds. The school psychologist asserted the “primary handicapping condition of [m]ental [r]etardation reflects [Claimant’s] present intellectual development.” (*Ibid.*) This school psychologist did not testify at hearing.

8. On August 1, 2004, a licensed clinical psychologist, Dr. Ann Walker, Ph.D., evaluated Claimant at the request of the Service Agency. Claimant was 18 years old at the time. Dr. Walker evaluated Claimant primarily in Spanish. Claimant was administered an intelligence test, known as the WAIS III, to elicit his intellectual functioning levels. Claimant had a 78 verbal IQ, an 85 performance IQ, and a full scale IQ of 79. According to Dr. Walker, Claimant’s verbal cognitive intellectual skills were in the normal range and his verbal cognitive intellectual skills and overall cognitive skills were in the borderline range. Claimant’s academic skills showed dramatic delays: spelling at the first grade level, reading at the second grade level, and arithmetic at the third grade level. Dr. Walker stated Claimant’s academic skills were “below the level that would be expected given [Claimant’s] cognitive intellectual functioning.” (Exhibit J.) Dr. Walker attributed the discrepancy between his academic performance and his intellectual test results as possibly related to his behavioral problems and inconsistent school attendance. Claimant was administered the Vineland Adaptive Behavior Scales, wherein he scored in the following domains: 51 in communication, 76 in daily living skills, and 68 in socialization skills. According to Dr. Walker, Claimant’s scores translate into borderline range performance in self-help skills and in the “mild range” for socialization skills. (*Ibid.*) The evidence did not clarify what “mild” meant. Dr. Walker diagnosed Claimant with schizoaffective disorder and a learning disability. Dr. Walker did not diagnose Claimant with mental retardation.

9. On May 12, 2006, Dr. Marjorie Graham-Howard, a clinical psychologist, conducted a psychological assessment of Claimant at the request of Claimant’s attorney. Dr. Graham-Howard administered the Wechsler Abbreviated Intelligence Scale (WASI) to uncover Claimant’s IQ. Dr. Graham-Howard conceded the WASI was an abbreviated IQ test, a shortened intelligence test when compared to the test used by Dr. Walker, among others. The testing revealed a full-scale IQ of 66 (a verbal IQ of 62, and a performance IQ of

74). Dr. Graham-Howard placed Claimant's full-scale intelligence quotient in the first percentile rank. She described Claimant as "functionally illiterate" and "socially and developmentally immature." (Exhibit Q.) Claimant's adaptive functioning was not tested. Dr. Graham-Howard further described Claimant's skills as follows: "[Claimant's] abstract reasoning skills were good and he demonstrated good judgment when asked what he would do with a series of hypothetical situations. Insight to his current situation was good." (*Ibid.*) Dr. Graham-Howard diagnosed Claimant with, among other diagnoses, schizoaffective disorder, depressive type, and mild mental retardation. As to his school functioning, Dr. Graham-Howard found that Claimant "began exhibiting behavioral and academic problems at school in middle school. Prior to that, he [Claimant] indicated he done [sic] 'alright.' Initially [Claimant's] grades were B's and C's until about the sixth grade." (*Ibid.*)

10. Both Dr. Walker and Dr. Graham-Howard agreed that, as a general proposition, a person whose intelligence is being tested can perform below their ability, but cannot perform above their ability.

11. Claimant sat at six months of age, he crawled at seven months, walked at 14 months, and was toilet trained at 36 months. Claimant is bilingual (Spanish and English). He entered school in the second grade, after arriving in the United States from Nicaragua. Claimant's school history showed extremely poor attendance and consistent problems with fighting and truancy. By the time Claimant reached the eighth grade, he had joined a street gang and had been suspended multiple times. He attended four schools in one year. At thirteen years of age, Claimant stopped attending school, reaching only the eighth grade, and began using drugs, namely crack cocaine, marijuana, and alcohol. He was arrested in October 1999. Claimant began receiving special education services in 2000.

12. Claimant had a history of psychiatric diagnoses, for which he has been prescribed psychotropic medication. Claimant began experiencing psychotic and depressive symptoms at 13. He has attempted suicide multiple times and verbalizes threats to hurt himself. Claimant has attempted suicide by cutting his wrists, drinking floor cleaner, and throwing himself at the sink in his cell. While in the CYA, he has been placed on suicide watch and injured himself by cutting his arms, chest, and penis. From an age uncertain, Claimant began to experience visual and verbal hallucinations (he occasionally experiences visual hallucinations in the form of dots). Claimant hears voices (auditory hallucinations) that urge him to hurt or kill himself. He voices paranoid ideation about those around him. Claimant does not hear voices while medicated. He often thinks people are out to get or kill him. Claimant claims the devil talks to him. At one time for an uncertain duration, Claimant was placed at Metropolitan State Hospital for stabilization after mentally decompensating at the CYA.

13. Both parties relied on the definition of mental retardation contained in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (DSM-IV-TR). According to the DSM-IV-TR, "[t]he essential feature of Mental Retardation is significantly subaverage general intellectual functioning . . . that is accompanied by significant limitations in adaptive functioning in at

least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety The onset must occur before age 18 years General intellectual functioning is defined by the intelligence quotient (IQ or IQ-equivalent) obtained by assessment Significantly subaverage intellectual functioning is defined as an IQ of about 70 or below It should be noted that there is a measurement error of approximately 5 points in assessing IQ, although this may vary from instrument to instrument Thus it is possible to diagnose Mental Retardation in individuals with IQs between 70 and 75 who exhibit significant deficits in adaptive behavior.” (Exhibit Y.)

14. In describing mild mental retardation, the DSM-IV-TR, states, in part, “As a group, people with this level of Mental Retardation, typically develop social and communication skills during the preschool years (ages 0-5 years), have minimal impairment in sensorimotor areas, and often are not distinguishable from children without Mental Retardation until a later age. By their late teens, they can acquire academic skills up to approximately the sixth-grade level.” (Exhibit Y.)

LEGAL CONCLUSIONS

1. Cause exists to deny Claimant’s appeal, as set forth in Factual Findings 1, 5-14, and Legal Conclusions 2-14.

2. Welfare and Institutions Code section 4512 states:

“Developmental disability” means a disability that originates before an individual attains age 18 years, continues, or can be expected to continue, indefinitely, and constitutes a substantial disability for that individual. As defined by the Director of Developmental Services, in consultation with the Superintendent of Public Instruction, this term shall include mental retardation, cerebral palsy, epilepsy, and autism. This term shall also include disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation, but shall not include other handicapping conditions that are solely physical in nature.

3. California Code of Regulations, title 17, section 54001 states in pertinent part:

(a) “Substantial disability” means:

(1) A condition which results in major impairment of cognitive and/or social functioning, representing sufficient impairment to require interdisciplinary planning and coordination of special or generic services to assist the individual in achieving maximum potential; and

(2) The existence of significant functional limitations, as determined by the regional center, in three or more of the following areas of major life activity, as appropriate to the person's age:

- (A) Receptive and expressive language;
- (B) Learning;
- (C) Self-care;
- (D) Mobility;
- (E) Self-direction;
- (F) Capacity for independent living;
- (G) Economic self-sufficiency.

(b) The assessment of substantial disability shall be made by a group of Regional Center professionals of differing disciplines and shall include consideration of similar qualification appraisals performed by other interdisciplinary bodies of the Department serving the potential client. The group shall include as a minimum a program coordinator, a physician, and a psychologist.

(c) The Regional Center professional group shall consult the potential client, parent . . . educators, advocates, and other client representatives to the extent that they are willing and available to participate in its deliberations and to the extent that the appropriate consent is obtained.

4. California Code of Regulations, title 17, section 54001 states, "[c]ognitive' as used in this chapter means the ability of an individual to solve problems with insight, to adapt to new situations, to think abstractly and to profit from experience."

Mental Retardation

5. Claimant has a disabling condition, but Claimant did not establish, by a preponderance of the evidence, that he has mental retardation. According to Dr. Walker's assessment, Claimant's IQ (79) puts him above the diagnostic cut-off for mental retardation (70). Claimant's IQ places him outside the range of mental retardation even if one considers the five-point margin of error in IQ testing. (See, Factual Finding 13.) In contrast, Dr. Graham-Howard assessed Claimant's IQ at 66, well within the range of mental retardation. However, Claimant bears the burden of proof, and Claimant did not prove Dr. Walker's assessment was defective or less reliable than Dr. Graham-Howard's evaluation. Both psychologists agreed the IQ test Dr. Graham-Howard used was a shortened version with a less complete battery of subtests than the test used by Dr. Walker. Both psychologists also agreed that as a general proposition, a person whose intelligence is being tested could not test above his or her ability, but a person could test below his or her ability. Considering these additional factors, Dr. Walker's assessment and findings carry more weight than Dr. Graham-Howard's evaluation.

6. The only evaluation of Claimant conducted before he was 18, the 2000 psychoeducational evaluation, considered but rejected a diagnosis of mental retardation. (Factual Finding 6.) The evaluator found that Claimant could have been identified as having mental retardation, but the psychologist instead diagnosed Claimant with a learning disability, despite evidence of limited adaptive skills. The school psychologist who conducted the 2000 evaluation did not testify. This evaluation therefore did not support a diagnosis of mental retardation.

7. The March 2004 psychoeducational evaluation found Claimant had mental retardation. (Factual Finding 7.) However, with limited information regarding the evaluator, the evaluator's competence, background, and qualifications remained unknown and questionable. Furthermore, the reliability and accuracy of the intelligence testing used (the CTONI), and the accuracy and acceptability (within the psychological community) of the adaptive skills test used remained unknown as well. The findings of this evaluation were, therefore, given little weight.

8. Both parties pointed to Claimant's attainment of Bs and Cs in school up to the sixth grade. The Service Agency argued this tended to show Claimant's average intelligence during a portion of his childhood, disproving the existence of congenital mental retardation. Claimant pointed to the DSM-IV-TR's description of mild mental retardation, showing that persons with the diagnosis generally peak at a sixth grade academic level. (Factual Finding 14.) However, a close read of the DSM-IV-TR's description clarifies that persons with mild mental retardation reach a sixth grade academic level "[b]y their late teens." (*Ibid.*) The evidence showed Claimant's academic performance dropped in the sixth grade, but it did not prove he was performing poorly before then. Instead, the evidence supported a finding that Claimant was doing adequately until the sixth grade, an academic trajectory not presumed for persons with mental retardation, according to the DSM-IV-TR's description of mild mental retardation. (*Ibid.*) Additionally, Claimant's expert, Dr. Graham-Howard, found Claimant's abstract reasoning, judgment, and insight were good. (Factual Finding 9.) That finding contradicts a cognitive impairment, as defined by regulation. (Cal. Code Regs., tit. 17, § 54001.)

9. With no persuasive evidence supporting a diagnosis of mental retardation, including Dr. Graham-Howard's evaluation, Claimant did not meet his burden. Claimant did not prove he had mental retardation.

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A Condition Closely Related to Mental Retardation

10. Claimant's IQ is closely related to the IQ scores of persons with mental retardation. Dr. Walker's finding of a 79 IQ places Claimant only four points above a possible diagnosis of mental retardation (a 75 IQ).² However, a diagnosis of mental retardation, according to the DSM-IV-TR, requires not only a low IQ, but significant limitations in adaptive functioning also. Therefore, a condition closely related to mental retardation requires that both Claimant's IQ and his adaptive functioning be limited. While Claimant's IQ is close to that of persons with mental retardation, the evidence did not prove, by a preponderance, that Claimant's adaptive functioning, prior to the age of 18, was sufficiently limited. The evidence also did not prove Claimant's adaptive deficits, those exhibited before 18, were not attributable to a confluence of Claimant's significant lack of schooling, socio-economic deprivations, and psychiatric disabilities.

11. The specific evidence of Claimant's adaptive skills before he reached age 18 consisted mainly of significantly low academic skills, difficulty identifying simple words, difficulty reading a clock, an inability to use a phone book, and weak short-term memory. (Factual Finding 6.) Claimant was 14, but functioning like a nine-year-old. (*Ibid.*) However, with the exception of reading a clock and problems with short-term memory, Claimant's adaptive deficits were problems demonstrating extremely poor reading skills; skills resultant of Claimant's significant lack of schooling. Claimant moved schools often, engaged in truancy, and stopped going to school by the eighth grade. The causal connection between Claimant's adaptive problems, as noted in the 2000 psychoeducational evaluation, and Claimant's incarceration/institutionalization at 13, and his limited schooling was not disproven by Claimant's evidence. Claimant's educational deprivations do not entirely account for Claimant's inability to read a clock, or for his short-term memory problems. However, a conclusion that Claimant has a condition closely related to mental retardation cannot stand on these deficits alone. Furthermore, there was insufficient evidence in the 2000 psychoeducational evaluation to persuasively support the school psychologist's conclusion that Claimant functioned like a nine-year-old. His assertion, while considered in this analysis, lent little support to Claimant's case without specific observations and findings.

12. The 2000 psychoeducational evaluation was the only evidence of Claimant's adaptive functioning before he reached 18.³ Evidence of Claimant's childhood abilities from other possible sources, like his family or others who may have observed him performing activities of daily living, was missing. Thus, while Claimant's adaptive skills tested low in

² As Claimant's adaptive functioning consistently tested low, a 75 IQ constituted a possible diagnosis of mental retardation in this analysis because the intelligence testing five-point margin of error, noted in the DSM-IV-TR, is added to the 70 IQ cut-off. (See Factual Finding 13.)

³ Significantly, Claimant never established by evidence that his adaptive functioning now was the same or worse than his pre-18 functioning.

the 2004 psychoeducational evaluation (Factual Finding 7), and in Dr. Walker's psychological evaluation (Factual Finding 8), neither of those results supports a conclusion of a condition closely related to mental retardation. The 2004 psychoeducational evaluation was given little weight, as discussed in Legal Conclusion 7. Dr. Walker considered Claimant's adaptive functioning in her assessment, but failed to find he had a condition closely related to mental retardation. While her characterization of Claimant's adaptive functioning seemed overly optimistic, her overall conclusions are supported by the data evidenced in the record, and Dr. Walker's assessment is given due weight. (*Mason v. Office of Administrative Hearings* (2001) 89 Cal.App. 4th 1119, 1129.) Consequently, Claimant did not prove he had a condition closely related to mental retardation. (Welf. & Inst. Code, § 4512.)

Treatment Needs of Persons with Mental Retardation

13. Claimant did not prove he had treatment needs similar to the needs of persons with mental retardation. Claimant argued "[w]hen [his] needs are placed in juxtaposition to what [the Service Agency] is mandated to provide . . . the evidence supports a finding that Jorge requires a learning environment similar to that of people with mental retardation." (Exhibit CC.) However, Claimant supported his argument by citing to Claimant's 2004 and 2005 educational records. Those records documented Claimant's educational needs when Claimant was over 18. To establish a developmental disability, Claimant must have established what his treatment needs were before he turned 18. (Welf. & Inst. Code, § 4512.) Moreover, it is not enough for Claimant to show he could benefit from what the Service Agency is mandated to offer, pursuant to Welfare and Institutions Code section 4512, subdivision (b). Claimant had to establish what he particularly needed to address his disability, prior to reaching 18 years of age. The evidence established Claimant required special education, but as many students without mental retardation require special education, and Claimant has a learning disability, the fact that he attends school in a special education program, could not establish Claimant had treatment needs similar to persons with mental retardation.

Substantial Disability

14. Since Claimant did not establish mental retardation, a condition closely related to mental retardation, or similar treatment needs to persons with mental retardation, an analysis of substantial disability, pursuant to California Code of Regulations, title 17, section 54001, is unnecessary.

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ORDER

Claimant's appeal is denied. Claimant is not eligible for services from the Service Agency.

Dated: February 26, 2007

DANIEL JUAREZ
Administrative Law Judge
Office of Administrative Hearings

THIS IS THE FINAL ADMINISTRATIVE DECISION. THIS DECISION BINDS BOTH PARTIES. EITHER PARTY MAY APPEAL THIS DECISION TO A COURT OF COMPETENT JURISDICTION WITHIN 90 DAYS.